85-560
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JACK R. & MARIA MATTOX,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty, T.I.A.S. 10031, exempt from United States taxation the salaries received by United States citizens employed by the Panama Canal Commission.

REFERENCE TO PARTIES BELOW

The following were parties to the proceedings before the United States Court of Appeals for the Federal Circuit:

Paul H. and Patricia Coplin (No. 85-504);

Robert E. O'Connor, et ux, Gladys E. O'Connor (No. 85-505);

John D. Coffin (No. 85-506);

Jack R. and Maria R. Mattox (No. 85-507); and

The United States of America.

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OPINIONS BELOW

The opinion delivered upon the rendering of the judgment sought to be reviewed is that of the United States Court of Appeals for the Federal Circuit in *Paul H. and Patricia Coplin, et al.,* No. 85-504, decided May 10, 1985, rehearing denied July 3, 1985. That opinion is reported at 761 F.2d 688.

That opinion reversed the opinion of the United States Claims Court in the consolidated cases of *Paul H. and Patricia Coplin, et al.* v. *United States,* No. 517-81T decided July 30, 1984. That opinion is reported at 6 Cl. Ct. 115 (1984).

These opinions, and an opinion of the United States Court of Appeals for the Eleventh Circuit in *Ralph D. Harris and Joan F. Harris* v. *United States,* 768 F.2d 1240, are reprinted in the Appendix submitted concurrently herewith by the parties below. These cases involve identical or closely related questions sought to be reviewed on certiorari to the same court, and these petitioners have joined in this Appendix upon their petition for a writ of certiorari herein.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Federal Circuit upon rehearing was entered July 3, 1983, and accordingly, the time for filing this petition for writ of certiorari is to and including October 1, 1985. 28 U.S.C. § 2101(c).

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1245(1), authorizing review of judgments of Courts of Appeals by writ of certiorari.

TREATY AND STATUTES INVOLVED

Pursuant to the Isthmian Canal Convention, T.S. No. 431, 33 Stat. 2234 (Nov. 18, 1903) the United States constructed the Panama Canal. That Treaty granted to the United States "the rights, powers, and authority . . . which the United States would possess and exercise if it were the sovereign of the territory . . ." *id.* Article III.

On September 7, 1977, the United States and Panama entered into the Panama Canal Treaty, T.I.A.S. No. 10030, effective October 1, 1979, which treaty, in part, restored to Panama the territorial sovereignty over the Canal Zone but permitted the United States

the right to manage, operate, and maintain the canal until the year 2000. The Panama Canal Treaty between the United States of America and Panama, September 7, 1977, T.I.A.S. No. 10030 provides, in part:

ARTICLE III

Canal Operating and Management

* * * * *

9. The use of the areas, waters and installations with respect to which the United States of America is granted rights pursuant to this Article, and the rights and legal status of United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed this date.

* * * * *

Article XV of the Agreement Between the United States of America and Panama in Implementation of Article III of the Panama Canal Treaty, September 7, 1977, T.I.A.S. No. 10031, governs taxation of the Panama Canal Commission, its contractors and subcontractors, and its U.S. citizen employees and their dependents. That Article provides:

ARTICLE XV

Taxation

1. By virtue of this Agreement, the Commission, its contractors and subcontractors are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.

2. United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their

work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

3. United States citizen employees and dependents shall be exempt from taxes, fees, or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their sponsor's work with the Commission.

4. The Coordinating Committee may establish such regulations as may be appropriate for the Implementation of this Article.

The Internal Revenue Code of 1954 (26 U.S.C.) provides, in part:

> SEC. 894 [as amended by Sec. 205(a), Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, 80 Stat. 1539]. INCOME AFFECTED BY TREATY.
>
> (a) *Income Exempt Under Treaty.*—Income of any kind, to the extent required by any treaty obligation of the United States, shall not be included in gross income and shall be exempt from taxation under this subtitle.

United States Treasury Department regulation on income tax implementing this section of the Code (26 C.F.R.) provides, in part:

> § 1.894-1 *Income Affected By Treaty.*
>
> (a) *Income Exempt Under Treaty.* Income of any kind is not included in gross income and is exempt from tax under subtitle A (relating to income taxes), to the extent required by any income tax convention to which the United States is a party. However, unless otherwise provided by an

> income tax convention, the exclusion from gross income under Section 894(a) and this paragraph does not apply in determining the accumulated taxable income of a foreign corporation under section 535 and the regulations thereunder or the undistributed personal holding company income of a foreign corporation under section 545 and the regulations thereunder. Moreover, the distributable net income of a foreign trust is determined without regard to section 894 and this paragraph, to the extent provided by section 643(a)(6)(B). Further, the compensating tax adjustment required by section 819(a)(3) in the case of a foreign life insurance company is to be determined, without regard to section 894 and this paragraph, to the extent required by section 819(a)(3)(A). See § 1.871-12 for the manner of determining the tax liability of a nonresident alien individual or foreign corporation whose gross income includes income on which the tax is reduced under a tax convention.

STATEMENT OF THE CASE

Jack R. Mattox is a citizen of the United States. Maria R. Mattox, his wife, is a non-resident alien. At all times pertinent to this case, the Mattoxes were domiciled in the Republic of Panama where Jack Mattox is employed by the Panama Canal Commission as a ship's pilot navigating ocean-going vessels through the canal. As U.S. taxpayers, the Mattoxes contend that Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty constitutes an express exemption from U.S. taxation on the salary Jack Mattox receives from the Commission.

On or about April 15, 1981, the Mattoxes filed their federal income tax return for 1980. On or about April 24, 1981, they filed a claim for refund for their 1980 tax year. This claim was denied by the Internal Rev-

enue Service by letter dated January 18, 1982. On or about April 15, 1982, they filed their federal income tax return for 1981. Subsequent thereto, they filed a claim for refund in connection with their 1981 tax year. This claim for refund was also denied by the Internal Revenue Service on or about July 23, 1982.

Accordingly, Jack R. and Maria Mattox filed a claim in the United States Claims Court for a refund of taxes paid for 1980 and 1981 in an amount of $28,215.75 plus interest. On January 19, 1984, the United States Claims Court entered an order that these plaintiffs would be bound by that Court's ruling in *Coplin* v. *United States;* and on July 31, 1984 judgment was entered in the Mattoxes favor in the amount claimed.

The United States appealed the Claims Court ruling, and the Federal Circuit reversed the opinion for the taxpayers by Claims Court Chief Judge Kozinski.

REASONS FOR ALLOWANCE OF THE WRIT

I. The United States Court Of Appeals For The Federal Circuit Has Rendered A Decision Which Is In Conflict With The Decision Of The United States Court Of Appeals For The Eleventh Circuit On The Same Subject Matter

A. Related Cases

The issue of taxation of income of U.S. citizen employees derived from their Panama Canal Commission employment has been the subject of much litigation in U.S. courts with differing results; [Compare *Corliss* v. *United States,* 567 F. Supp. 162 (W.D. Ark. 1983) and *Highley* v. *United States,* 574 F. Supp. 715 (M.D. Tenn. 1983) with *Coplin, et al.* v. *United States,* 6 Cl. Ct. 115 (1984)]; and, this issue has resulted in conflicting decisions by United States Courts of Appeals on the same subject matter [Compare *Coplin, et al.* v. *United States,* 761 F.2d 688 (Fed. Cir. 1985) with *Harris* v. *United States,* 768 F.2d 1240 (11th Cir. 1985)]. Consequently, this issue should be appropriate for final determination by the Supreme Court of the United States.

B. The Decision of the United States Court of Appeals for the Federal Circuit Conflicts with the Decision of the United States Court of Appeals for the Eleventh Circuit

In addressing the merits of the *Coplin* case, the Federal Circuit recognized that the court's "role is limited to giving effect to the intent of the Treaty parties," citing *Sumitomo Shoji America, Inc.* v. *Avagliano,* 457 U.S. 176, at 185 (1982). In determining the intent of the treaty parties, the Federal Circuit apparently gave great weight to a diplomatic note from the Panamanian Foreign Ministry which was delivered to the chambers of that Court on the morning of the day of oral argument in the case. Relying upon this late filed document, the Federal Circuit concluded that the interpretation of the Panamanian and United States governments were now consistent and accordingly, reversed the Claims Court opinion.

The United States Court of Appeals for the Eleventh Circuit, however, considered an almost identical record including the late filed diplomatic note and rejected ". . . the government's suggestion that self serving evidence outside the record, for which additional explanation is required, can be considered by this court." *Harris* v. *United States,* 768 F.2d 1240, 1242. The Eleventh Circuit then upheld its District Court's finding that the language of "[p]aragraph two of Article XV speaks in clear and sweeping terms. It provides that U.S. citizen employees of the PCC *'shall be ex-*

empt from any taxes, fees, or other charges on income received as a result of their work for the Commission'." *Id.,* 768 F.2d at 1243.

As this issue now stands as a result of these conflicting federal courts of appeals decisions there may be disparate treatment of United States citizen employees of the Panama Canal Commission with respect to taxation of their salaries from Commission employment.

II. The United States Court Of Appeals For The Federal Circuit Has Decided A Federal Question Which Is Inconsistent With Applicable Decisions Of This Court

The federal question before this Court upon this petition for a writ of certiorari is whether, as a result of the specific language of Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty, T.I.A.S. No. 10031, the U.S. citizen employees of the Panama Canal Commission are exempt from United States taxation on the salaries received from their employment with the Commission. Paragraph 2 of Article XV states, in part: "United States citizen employees and dependents shall be exempt from *any taxes,* fees, or other charges on income received as a result of their work for the Commission" (emphasis added). The United States insists that, rather than a literal translation of this language, one should interpret this provision by inserting the word "Panamanian" between "any" and "taxes" so that Commission employees salaries are exempt from Panamanian taxes, but subject to United States taxation under a general rule that United States taxpayer's world wide incomes are subject to tax regardless of their residence and regardless of the source of income. *Cook* v. *Tait,* 265 U.S. 47, 56 (1924). While the United States Court

of Appeals for the Federal Circuit acceded to the government's interpretation, the United States Court of Appeals for the Eleventh Circuit rejected this contention and held that in treaty interpretation "Clear language controls unless it 'effects a result inconsistent with the intent or expectations of its signatories.' See *Sumitomo Shoji America Inc.* v. *Avagliano,* 457 U.S. 176, 180 . . . (1982) [quoting *Maximov* v. *United States,* 373 U.S. 49, 54 . . . (1963)]" *Harris* v. *United States,* 768 F.2d at 1242. Petitioners respectfully suggest that the decision of the Eleventh Circuit Court is in closer keeping with the settled decisions of this Court than the decision of the Federal Circuit on this subject matter; and accordingly, the Federal Circuit decision for which this writ of certiorari is sought is in substantial conflict with the applicable decisions of this Court.

It is unquestioned that "Courts interpret treaties for themselves," *Kolovrat* v. *Oregon,* 366 U.S. 187, 194 (1961) and such interpretation begins ". . . with the language of the Treaty itself.", *Sumitomo Shoji,* 457 U.S. at 180, and includes reference to the intent of the high contracting parties where appropriate. *Id.,* 457 U.S. at 185. The decision of the Federal Circuit not only alters the clear language of the Agreement in Implementation of Article III of the Treaty, it is inconsistent with the stated expectations of the Panamanian government expressed during negotiations.

The Claims Court, in *Coplin* v. *United States* properly recognized that treaties and international agreements are contracts between sovereign states, *Santovincenzo* v. *Egan,* 284 U.S. 30, 40 (1931). In construing the terms of a treaty, the Claims Court concluded, its negotiating history may be consulted, *Cook* v. *United States,* 288 U.S. 102 (1933); and that, as with other

contracts, treaties are to be read in light of the conditions and circumstances existing at the time they were entered into with a view to effecting the objects and purposes of the contracting states. *Rocca* v. *Thompson,* 223 U.S. 317 (1912). Since the 1985 diplomatic note submitted by the government on the day of oral argument before the Federal Circuit is not by any means contemporaneous with the negotiations, it is more appropriate to analyze the archives in order "... to show that this insistence was brought forward in the course of negotiations . . ." *Sullivan* v. *Kidd,* 254 U.S. 433, 442 (1921). Given the presumption that "... treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties," *Rocca* v. *Thompson,* 223 U.S. at 332, the negotiating history is extremely critical in this case. The Federal Circuit decision apparently gave no weight to the contemporaneous statements of the Panamanian negotiators in the record before it.

In contrast, while applying the standard of treaty interpretation enunciated in *Sumitomo Shoji, supra,* the Claims Court looked beyond the plain meaning of the words used in the Agreement of Implementaton. and analyzed, among other things. the negotiating history between Panama and the United States as well as the legislative history during ratification by the United States Senate.

A. The Decision of the United States Court of Appeals for the Federal Circuit is Inconsistent With the Negotiating History of this Treaty

In *Sumitomo Shoji, supra,* this Court stated a reluctance to impose a different interpretation than that

which the signatories agreed was their intention. The Federal Circuit relied upon that decision as the stated basis for its reason to accept the late-filed diplomatic note as dispositive of this case. That diplomatic note, however, is inexplicably inconsistent with the evidence developed before the Claims Court regarding the negotiating history.

The Claims Court examined the negotiating history and found no support for the government's position that the words "any taxes" means only "any Panamanian taxes." To be sure, the Claims Court noted considerable obstacles to determinaton of what the parties intended with respect to Article XV, and found there was no "contemporaneous evidence" of the meaning either party placed on the language of Article XV that is the subject of controversy. *Coplin* v. *United States,* 6 Cl. Ct. at 128 (1984). Even though sketchy, the trial court found "the record presented ... paints a far more complex picture of what happened at the negotiating table than defendant's argument would suggest." *Id.* 6 Ct. Cl. at 129.

The Claims Court recognized that the United States and Panama held widely divergent views on the subject of taxation of Commission employees, *id.* and concluded there was no explicit contemporaneous record of the final disposition of this issue. *Id.* 6 Cl. Ct. at 131. Given this disagreement between the Panamanian and United States negotiators, the Claims Court held there was no basis to conclude that Panama acceded to the U.S. negotiators. The Claims Court found that ". . . the language adopted is not such a drastic departure from past practice as to render unthinkable the notion that it could have been the product of a deliberate com-

promise." *Id.* 6 Cl. Ct. at 135. This finding is reinforced by the legislative history of the ratification process.

This specific issue was raised in a colloquy between Senator Richard Stone and Herbert J. Hansell, Legal Advisor to the State Department in ratification hearings before the Senate Foreign Relations Committee. The decision of the Eleventh Circuit captures the essence of this legislator's prescience by stating: "The Senator was concerned that the tax issue could spawn litigation and suggested clarification through one of several established diplomatic channels." *Harris* v. *United States,* 768 F.2d 1240, 1246 (11th Cir. 1985). In this regard, the Eleventh Circuit concluded "We find no note exchange pertaining to Article XV on taxation despite ample opportunity between September 1977 when the Treaty documents were signed and October 1979 when they became effective." *Id.* 768 F.2d at 1246; and concluded "In sum, the competent affidavits and legislative history before the district court fully support the taxpayers position that the parties intended a bi-national tax exemption." *Id.* 768 F.2d at 1247. That record is substantially the same as the record established before the United States Claims Court.

B. The Decision of the United States Court of Appeals for the Federal Circuit is Inconsistent With the Record Before the Claims Court.

In overruling the United States Claims Court opinion in favor of the taxpayers in these related cases, the United States Court of Appeals concluded that its consideration of the cable was not ". . . barred because it was not 'available' when the record closed in the

lower court. In determining the proper interpretation of a treaty provision, the Supreme Court relied on expressions of intent in diplomatic correspondence dated more than a year after the appellate court decision and within a few days of argument before the Court itself." *Coplin* v. *United States,* 761 F.2d 688, 691 (Fed. Cir. 1985). Citing *Sumitomo Shoji America, Inc.* v. *Avagliano,* 457 U.S. 176, 184 n.9 (1982). While this general principle of treaty interpretation may be accurate as stated, the application in this case is inconsistent with the record before the Claims Court, and this inconsistency requires an additional explanation. *See: Harris* v. *United States,* 768 F.2d at 1242.

For example, the government's interpretation that the language of Article XV exempting the U.S. citizen employees from any taxes may have been a drafting error was considered and rejected by the Claims Court. "This is an agreement drafted by sophisticated parties, obviously capable of using precise language." *Coplin* v. *United States,* 6 Cl. Ct. at 127. The Claims Court also considered the government's failure to clarify the language before it went into effect as evidence that the parties intended the stated language to be a product of compromise. *Id.* 6 Cl. Ct. at 140. See also: *Harris* v. *United States,* 768 F.2d at 1246.

It is recognized that there are several cases which have ruled against taxpayers concerning the meaning of this aspect of the Panama Canal Treaty, *e.g., Corliss* v. *United States,* 567 F. Supp. 162 (W.D. Ark. 1983) and *Highley* v. *United States,* 574 F. Supp. 715 (M.D. Tenn. 1983). It is, however, doubtful that until *Coplin* v. *United States,* 6 Cl. Ct. 115, no taxpayer was able to develop through extensive discovery such a complete

record of the negotiating history of this matter as was before the Claims Court. Accordingly, it is suggested that a review of those cases confirms they were made without full benefit of the negotiating history.

In the Claims Court, however, the trial Court had the opportunity to fill the factual void with concrete examples of the "divergent views on the subject of taxation of Commission employees," *Coplin* v. *United States,* 6 Cl. Ct. at 129; and found that "the dispute centered largely on a fundamental disagreement as to the nature and status of the Panama Canal Commission" *id.* One such record reference, apparently not before the Arkansas Federal District Court in *Corliss* v. *United States, supra,* was the exchange during the negotiating session July 14, 1977 in which Mr. Rodrigo Gonzales of Panama stated an opposition to the continued exercise of U.S. sovereign authority in the new Panamanian territory, *Coplin* v. *United States,* 6 Cl. Ct. at 130. His opposition to taxation of U.S. citizen employees of the Commission was summarized by minister Aristides Royo of Panama:

> We must recognize the changing situation, that this Zone will no longer be a place where American workers are subject to U.S. jurisdiction, laws, police and courts. The situation will now be one in which American workers, although employed by the American government, will be subjected to a foreign jurisdiction, police, as the colonial status will cease to exist. *id.* 6 Cl. Ct. at 130.

Given the divergent views of the negotiators on this point, the Claims Court analyzed the negotiating process and found that ". . . the positions of the parties hardened and their differences grew wider rather than narrower" *id.* 6 Cl. Ct. at 131, and further that ". . .

the contemporaneous record of negotiations abruptly ceases." *Id.* 6 Cl. Ct. at 131. Under these circumstances, *i.e.,* no clear expression of the intent of the signatories, the Claims Court analyzed the failure of the United States to clarify the language prior to ratification, *id.* 6 Cl. Ct. at 138-142 and concluded, ". . . that officials of the Department of State who were familiar with the treaty negotiations (and access to the then classified negotiating transcripts) feared that Panama would refuse to concur in their interpretation of Article XV and for that reason refused to seek its consent." *Id.* 6 Cl. Ct. at 142-143.

Accordingly, the Federal Circuit's opinion is a marked departure from the applicable decisions of this Court, for it ignored the contemporaneous expressions of the Panamanian negotiators brought forth during the course of negotiations. *Sullivan* v. *Kidd,* 254 U.S. 433, 442 (1921) and *Kolovrat* v. *Oregon,* 366 U.S. 187 (1961).

CONCLUSION

This Court observed in *Kolovrat* v. *Oregon, supra,* that "courts interpret treaties for themselves." 366 U.S. at 194. Given the conflicting decisions by federal courts on the subject of taxation of the salaries of United States citizens employed by the Panama Canal Commission interpreting the language of Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty, we respectfully urge that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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